

adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally.

The issue involved in this matter was in fact raised recently in *P.E. Long et al. v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Two Ors.*⁽²⁷⁾ before Arulanandom, J., when he decided that detention for trafficking in drugs is within the purview of the Ordinance. I have approached and considered the question in issue independently and have come to the same conclusion.

I am accordingly of the view that the ground on which the order of detention was made against the applicant, namely, trafficking in drugs, is within the scope and ambit of the Ordinance and that the contention to the contrary raised on behalf of the applicant is ill-founded, and I would in passing express the hope that my judgment in this matter will have served a purpose, if for nothing else, at least perhaps in providing a sufficient contraceptive against the proliferation of like applications for habeas corpus founded on the identical contention.

I must express my appreciation to counsel on both sides for the careful arguments addressed to me and it is no indication of disrespect to them that I have not in this judgment dealt with the cases they cited to me but I have thought it necessary however to consider and discuss other authorities not cited by either side but which appear to me to be pertinent to the crux of the contention raised in this matter. If I may seem to have quoted authority overmuch, this was to satisfy the desire to manifest the comforting sentiment that my decision on the issue involved is reinforced by the sanction of something stronger than my own unaided thought.

In the event *cadit quaestio*. Habeas corpus cannot as a result go and the application fails.

Application failed.

Solicitors: *Karpal Singh & Co.*

A LOH KOH FAH v. LEE MOY LAN

[O.C.J. (Hashim Yeop A. Sani J.) April 30, 1975]
[Ipoh — Originating Summons No. 82 of 1974]

Guardianship of Infants — Custody — Application for custody of infants — Infants living with mother in Singapore — Meaning of "welfare of the infant" — Guardianship of Infants Act, 1961, ss. 5, 10 and 11.

B The parties were married in December 1964, and after the celebration of their marriage lived with the applicant's parents in Ipoh. Subsequently, they moved into their matrimonial home in Ipoh. In mid 1970 the applicant and the respondent mutually agreed that the children should be moved to Singapore to receive their education there. The applicant visited his family in Singapore regularly until the end of 1973. He claimed that he stopped visiting them because he felt unwelcomed by the respondent. In the meantime, the applicant built up his business. On November 27, 1973, the applicant wrote to the respondent requesting her to return to Ipoh with the infants but she refused. The applicant contended that it would be in the best interest of his family that they should all live in Malaysia because of the changing economic situation, and as all his business commitments were in Malaysia. The respondent resisted the application on the grounds, namely, that the applicant was highly involved with his business interests and could spend very little time with his children as he was constantly on the move.

Held: (1) the expression "welfare of the infant" set out in section 11 of the Guardianship of Infants Act, 1961 should be construed in the widest possible terms. The court should put itself in the position of a reasonable and wise parent and determine what would be best for the infants, not what a selfish parent wants the infant to have;

E (2) having regard to the circumstances of the case, custody of the children would be vested in the respondent but guardianship of the infants should continue to remain with the applicant. The latter should have unrestricted access at all times.

[Editorial Note: This case was affirmed by the Federal Court, by a majority, on June 14, 1976. The Federal Court decision will be reported in due course.]

F Cases referred to:-

- (1) *Sim Hong Boon v. Lois Joan Sim* [19]3] 1 M.L.J. 1.
- (2) *The Queen v. Gnygall* [1893] 2 Q.B. 232, 248.
- (3) *Re Satpal Singh, An Infant* [1958] M.L.J. 283.
- (4) *Allen v. Allen* [1948] 2 All E.R. 413.
- (5) *Re T (Infants)* [1968] Ch.D. 704, C.A.

G ORIGINATING SUMMONS.

M. Sivalingam (Miss P. Leow with him) for the applicant.

Liew Choy-Hung (Miss) for the respondent.

H **Hashim Yeop A. Sani J.:** This is an application by the father of 3 infants, Loh Hui Shien, Loh Kwok Yuan and Loh Kwok Shiang, aged 9 years, 8 years and 7 years respectively, for their custody during their minority or until such further order. The eldest child is a girl and the two younger ones are boys. These infants are presently residing with their natural mother, the respondent who at the time of the hearing was still the lawful wife of the applicant. The applicant is residing in Ipoh and the infants and the respondent are residing in Singapore.

I The background facts to this case as can be elicited from the affidavits and the testimonies of the parties would seem to be briefly as follows. The parties were married in December 1964 and the infants are issues of the marriage born in 1965, 1967 and 1968 respectively. After the celebration of the mar-

riage the parties lived with the parents of the applicant in Ipoh until some differences arose between the respondent and the in-laws. Then the parties moved out into their matrimonial home at Jalan Bunga Telor, Canning Garden, Ipoh. In mid 1970 the applicant and the respondent mutually agreed that the children should be moved to Singapore to receive their education there because they felt uncertain about the education system here after the civil disorder in May 1969. Accordingly the infants and the respondent moved to Singapore and eventually took up residence in their present address, which is No. 4 Crichton Close, Serangoon Garden, Singapore. Living together with them is the younger brother of the applicant who is an engineer working in Singapore.

Another reason given in their evidence for the move to Singapore was that the applicant was then about to engage in some business ventures in Kelantan and as such would be away from their matrimonial home in Ipoh for long periods. Since they considered it would not be to the welfare of the infants that they should all move to Kelantan they decided on the move to Singapore. The applicant visited his family in Singapore regularly during the period following the move until the end of 1973 when he ceased visiting them altogether. Asked why he ceased visiting them the applicant gave the reason that he felt unwelcome by the respondent and that he was treated by her as a guest rather than as a husband and father to the infants.

In the meantime the applicant continued with his businesses and it would appear that his businesses flourished and he became director of a number of firms. According to the applicant, in the latter part of 1973 he changed his mind about his children being in Singapore. Owing to the changing economic situation in this country he said he considered that it would be in the best interest of his family that they should all live in Malaysia where all his business commitments are. Accordingly on November 7, 1973 he wrote to the respondent requesting her to return to Ipoh with the infants but she refused to do so — exhibit LKF. 1 in applicant's affidavit. The applicant in his affidavit and also in his evidence stated that he feels strongly that it would be in the best interest of the infants that they should live and receive their education in Malaysia so that they will not grow up to lose the opportunities open to them as citizens of this country. More particularly he mentioned that he would like his children to take over his businesses eventually. Furthermore he said all their close relatives are in Ipoh.

The respondent is resisting the application on the grounds namely that the applicant is highly involved with his business interests and is constantly on the move because of business commitments. Consequently, he can spend very little time with his children. In fact she said that when the applicant visited them in Singapore before the visits ceased at the end of 1973, the applicant spent most of his time visiting factories and his business associates in Singapore and left little or no time to the family. The implication is that if the infants are moved to Ipoh there is no certainty that the applicant as a father would give more attention to the children. Secondly, the respondent con-

A tends that such a move would be detrimental to the children because it would uproot them from an environment with which they have already become familiar. All the children are doing very well in schools as seen from their school reports in exhibits D1 and D2. She contends that it would also be utterly against their interests to return to Malaysia to a new system of education. If the applicant is anxious about the infants' knowledge of Bahasa Malaysia she maintains that the children are in fact already receiving competent instruction in Bahasa Malaysia in their present schools.

C The fact that the subject matter of the application, namely, the 3 infants are in Singapore and therefore outside the jurisdiction of the court would pose no problem. In this case both parties have submitted to the jurisdiction of the court and are citizens of this country and so are the infants. The court's jurisdiction over infants outside jurisdiction is already settled in *Sim Hong Boon v. Lois Joan Sim*.⁽¹⁾

D The applicant here is the natural father of the infants. Section 5 of the Guardianship of Infants Act, 1961 states as follows:—

"5. Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:

Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

Section 10 of the Act provides for the power of the court for the removal of guardianship as follows:—

"10. The court or a judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place."

Matters to be considered by the court in application for custody are set out in section 11 of the Guardianship of Infants Act, 1961.

"11. The court or a judge, in exercising the powers conferred by the foregoing provisions of this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

The principles on which the court shall act in making orders as to custody are set out in *Halsbury's*, Third Edition, at page 194 as follows:—

"The court, in making orders as to custody or access, will have regard to the conduct of the parents and to the wishes as well of the mother as of the father. It will exercise its jurisdiction to interfere in the interests of a child on account of the father's conduct, if it is satisfied that he has so conducted himself, or has shown himself to be a person of such a description or is placed in such a position as to render it practically essential to the safety or welfare of the child that the father's right should be treated as lost or suspended and should be superseded or interfered with. Interference will be justified by actual cruelty of the father either to his wife or child, by his avowal and adoption of principles of an irreligious and immoral character, by marital misconduct or by lack of means. Other things being equal, it is preferable that a child of tender years should be with its mother."

The word "welfare" is explained in *The Queen v. Gnygall*⁽²⁾ in the following terms:—

"Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the

court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction."

It would be wrong for the court to confine the meaning of "welfare" in considering a case of this nature within narrow confines of moral or material well-being only of an infant or the wishes of the parents or of either of them. The expression "welfare of the infant" set out in section 11 of our Act should be construed in the widest possible terms — see also *Re Satpal Singh, An Infant*⁽³⁾ and *Allen v. Allen*.⁽⁴⁾ The court should put itself in the position of a reasonable and wise parent and determine what would be best for the infant or infants, not what a selfish parent wants the infants to have.

Let us apply these guidelines to the present facts of this case. At the outset I am inclined to the view that neither of the parents of these infants can be said to be a "wrong-doer" in the real sense in the present conflict between them. The initial move in mid 1970 from Ipoh to Singapore was mutually agreed upon between the parents for reasons of their own. The facts therefore differ from the case in *Re T (Infants)*⁽⁵⁾ where the mother secretly took the infants out of jurisdiction. The refusal of the respondent to return to Ipoh cannot likewise be said to be unreasonable on the grounds given both in her affidavit and her testimony and that is so as not to uproot the infants from the environment with which they have become familiar. I saw the infants in chambers and they appeared well taken care of, healthy and bright and this I would attribute substantially to the love and care given by the respondent. Because in her testimony the respondent categorically stated that she would not go back to the applicant under the present circumstances I do not think it would be just for the court to take the risk and deprive the infants of the continued devotion and care of the respondent under which they have obviously thrived. I am still optimistic that the parties may solve their differences since the refusal of the respondent to return to the applicant for the present would seem to me, if the evidence is anything to go by, based only on the fear of domination from the parents of the applicant which may or may not be justified and her suspicion of the *bona fides* of the applicant. In his letter to her on the proposed trip to Europe very little time was given to her and the infants to prepare for the trip — letter dated November 7, 1973, LKF. 1 in affidavit of the applicant.

On the other hand I have no doubt whatsoever of the love and affection the applicant has for his children and that he is a good provider. There is no doubt therefore that if custody is given to him of the infants he is in a position to shower them with all the material advantages that a well-to-do parent can give. Even as late as 1973 when the applicant was abroad and despite the fact that he said his relationship with his brother (who is staying with the respondent and the infants in Singapore) was strained he sent a postcard to the brother asking whether the air-conditioner was fixed for the children's room. In court in the witness box he said he will sacrifice everything and tolerate to the end as long as the respondent and the infants come back to him. But these cannot be the

A sole consideration in making an order of custody in his favour.

The position of the parties can therefore be summarised as follows. The applicant wants the infants back to be with him and the children to receive their education in this country. According to him if respondent is not willing to come back to him reasonable access to the children will be given to her. If she is willing to come back to him he is prepared to make sacrifices and "tolerate to the end." The respondent, on the other hand, wants to have custody of the children in Singapore where she can continue to give the children her care and devotion. According to her, uprooting the children from their present environment would be detrimental to them as they are doing very well in their education and their extramural activities. According to her, however, her marriage to the applicant has reached "a point of no return." But she denied in cross-examination that she has asked the applicant for a divorce.

Therefore the wishes of the parents are clear cut; each wants custody of the children. In the case of the applicant the custody may be with or without the respondent. In the case of the respondent, she wants custody but she is not prepared to leave Singapore for the reasons given. From this it is undoubtedly clear that both the applicant and the respondent love the infants. I have therefore no doubt that whoever will be given custody of the infants, the infants will get the necessary care, love and devotion. But one must always remember that the ideal condition for the children would be to grow up in a home in the love and security of both parents. But if the ideal situation is not possible then the infants should not be deprived of the love and devotion of their natural mother if the mother has been shown capable of giving them. I do not think that all the material advantages that the applicant here can give can substitute for the care and devotion which the respondent has shown to her children. The grounds forwarded by the applicant for the need to change the education system for the children has no merit simply because I do not think there is any substantial difference in the education received in Singapore and the education received in this country especially for the purpose of taking over the applicant's businesses in the distant future. In fact the situation of families having children receiving education in Singapore is quite common in this country for personal and other reasons of the parents.

Although there seems for the time being some differences between the applicant and the respondent in connection with their marriage I do not think that the court should make this at this stage as a basis for making any order of custody. At least on the evidence the differences seem to me to be based solely on the fear of domination of the applicant's parents on the part of the respondent and the feeling of being unwelcome by the respondent on the part of the applicant whenever he visited his family in Singapore (which was denied by the respondent). The differences are therefore, in my view, not really so grave that the parties will never be reconciled as a result. There is every hope that these differences will be solved if the parties behave rationally. The fact that each has shown tremendous love for the children is already a

good sign in this direction. If I am wrong in this, it is my view that a final order as to custody should only be determined within the context and framework of the proceedings for dissolution.

Under the circumstances I have no doubt that at least for the moment it would be to the best interest and welfare of the infants that custody of the infants should be vested with the respondent and I so order. Because there is no evidence that access to the children was ever denied to the applicant (the ceasure of visitations by the applicant at the end of 1973 being on his own volition) although there is some evidence that the respondent would insist on being present whenever the applicant wanted to take the infants anywhere for fear of being deprived of custody, I shall order that there shall be unrestricted access at all times. Guardianship of the infants will continue to remain with the applicant. By virtue of section 3 of the Guardianship of Infants Act, 1961 the guardian shall be responsible for the support, health and education of the infants and as such I shall make no specific order as to maintenance.

The costs of the application which shall be taxed shall be borne by the applicant.

Order accordingly.

Solicitors: *Lim Kean Chye & Co.; C.H. Liew & Co.*

PARAMASIVAM & ANOR. v. ABDUL AZIZ & ORS.

[O.C.J. (Mohamed Azmi J.) May 16, 1975]

[Kuala Lumpur — Civil Suit No. 1048 of 1971]

Damages — Liability agreed on a 50:50 basis — Damages awarded — Appeal against quantum.

Damages — Skin-grafting — Shortening of right leg — Deformity of foot.

On October 14, 1969, the first plaintiff aged seven years old, was knocked down by motor-bus No. BD2019 driven by the first defendant. It was agreed between the parties that liability was on a 50:50 basis.

As a result of the aforesaid accident, both the first plaintiff and his father, the second plaintiff suffered loss and expense. The first plaintiff endured much pain and suffering. He had to undergo skin-grafting and the donor areas left permanent ugly scars to the left leg and both thighs. His right leg and right foot suffered shortening and there were injuries to the toes including the loss of one toe. There was a likelihood that he might develop arthritis in his ankle joint and his right big toe and possibly pain in his right foot as a result of his deformities and injuries in the future.

Special damages in the sum of \$3,400 for the first plaintiff and \$650 for the second plaintiff based on a 100 per cent liability was agreed between the parties. The court awarded the first plaintiff the sum of \$19,000 as general damages with interest. This was based on 50 per cent liability.

Held: the injuries were substantial having regard to the skin-graftings, shortening of the right leg and deformity of the right foot. Having regard to all the circumstances of the case, including the age of the boy, the amount awarded was fair and reasonable.

Cases referred to:-

- (1) *Lee Han Siong v. Loh Mun Hon* [1970] 2 M.L.J. xx.
- (2) *Lee Nya Chik & Anor. v. Koh Choon Ngoh* [1973] 1 M.L.J. xxviii.

A CIVIL SUIT.

R.K. Nathan for the plaintiffs.

N.A. Marjoribanks for the defendants.

Mohamed Azmi J.: This is a claim for damages arising out of a motor accident that took place on October 14, 1969, when the first plaintiff, who was then seven years old, was knocked down by motor-bus No. BD 2019 driven by the first defendant. The second plaintiff, who is the father of the first plaintiff, only claims for special damages. It is not in dispute that as a result of the accident, the first plaintiff suffered injuries and that both the plaintiffs suffered loss and expenses. On liability, both parties have agreed that it should be apportioned on 50:50 basis. They have also agreed on quantum of special damages, namely, \$3,400 for the first plaintiff and \$650 for the second plaintiff based on 100 per cent liability.

The only issue to be decided in this case is, therefore, on quantum of general damages in respect of the first plaintiff. After hearing submissions by counsel for both parties and having seen the present condition of the boy, I consider a lump sum award of \$38,000 in general damages based on 100 per cent liability is fair and reasonable. Based on 50 per cent liability, I entered judgment for the first plaintiff in the sum of \$19,000 as general damages with interest. Defendants have now appealed against the quantum of general damages.

- E** In arriving at my assessment on general damages, I took into consideration the following factors. Firstly, it was not in dispute that the plaintiff was seven years old at the time when he was knocked into by the bus driven by the first defendant. Secondly, he was hospitalised at Assunta Hospital from October 14 to December 26, 1969; after which, he was treated as an outpatient, during which time he must have endured much pain and suffering. On admission to the hospital, it was found that his right foot showed a severe avulsion injury with compound fracture of the bones of the foot including the ankle. Immediate operation was performed and the wound was excised and all devitalised tissues were removed.
- G** The foot was replaced in a semi-normal position. The main artery of the back of the foot was found to be severed and was ligated, although the main vessels on the sole of the foot were intact. It was then decided to try and save the foot which otherwise would have to be amputated. The boy had a severe convalescence and developed a very severe infection which eventually responded to several antibiotics. By November 17, 1969, it was possible to skin-graft the foot; and on December 4, remaining skin-grafts to the remaining areas were applied. After being discharged on December 26, he continued to receive medical treatment as an outpatient. During this period, he had been walking on a below-knee plaster and this was only removed on January 15, 1970. X-rays of the right foot revealed there was loss of the tarsus, i.e. the bones in front of the heel and behind the toes. There was a marked deformity of the foot with loss of tissue deep in the instep. One of his toes was missing and the soft tissues of the foot were abnormally shaped. The boy's present conditions as described in the Medical Report dated February 19, 1975 (Exhibit AB14) are as follows: